Supreme Court, U.S.
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NO. 96-1100

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

WARWICK MALL TRUST, BLISS PROPERTIES, INC., AND IRVING SCHWARTZ,
PETITIONERS,

v.

THE STATE OF RHODE ISLAND, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island

REPLY TO BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED FOR REVIEW

Whether, in a case where the highest court of a state issues an order disposing of that case and stating that an opinion setting forth the court's reasoning will follow, the time for filing a petition for certiorari with this Court runs from the date of the order or the date the opinion is issued.

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ARGUMENT

THE PETITION IS NOT UNTIMELY BECAUSE THE CASE WAS NOT FINALLY ADJUDGED AND DECIDED UNTIL THE RHODE ISLAND SUPREME COURT ISSUED ITS OPINION.

The Respondents in this case have argued in their briefs in opposition to the petition for certiorari that this Court lacks jurisdiction to review the Rhode Island Supreme Court's decision because the petition was not timely under 28 U.S.C. § 2101(c) or Sup. Ct. R. 13.1. This argument is based upon the order of the Rhode Island Supreme Court entered July 19, 1996 which simply affirmed the judgment of the Superior Court. This order stated that "[a]n opinion setting forth the reasons for this order will follow." (A-1.) Such an opinion did ensue on October 11, 1996 (A-4), which opinion disclosed the reasoning behind the Rhode Island Supreme Court's order. That court also stated in the conclusion to the opinion that "we have affirmed the judgment of the Superior Court and denied and dismissed the plaintiffs' appeal." (A-22.) The Respondents do not claim that the petition for certiorari was not filed within 90 days of the issuance of this opinion.

The answer to this jurisdictional argument is that the July 19, 1996 order of the Rhode Island Supreme Court was not under the circumstances of this case a final judgment or decree for the purposes of 28 U.S.C. § 2101(c) and the 90-day period for applying for a writ of certiorari did not begin to run from the date of that order.

The Respondents cite no statute, rule, or case which compels the conclusion that the state court's initial order, which indicated that an opinion would follow, is a final judgment or decree for the purposes of either 28 U.S.C. § 2101 or Rule 13.1.

Indeed, this argument is refuted by this Court's rulings that the test to be applied in determining whether a lower court's order triggers the 90-day clock "is a practical one." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Market St. Ry. v. Railroad Commission of California*, 324 U.S. 548, 552 (1945). Whether a judicial act constitutes a judgment or decree for the purposes of 28 U.S.C. § 2101(c) "ought not to be decided on nice-spun argumentation" in disregard of the practice and assumptions of the courts at issue. *Commissioner v. Bedford's Estate*, 325 U.S. 283, 287-88 (1945).

As applied to the instant case, those practical concerns include the fact that compliance with this Court's rules on the preparation of a petition for certiorari from a state court judgment or decree is essentially impossible absent the issuance of an opinion by the state court. Rule 14.1(g) of this Court requires a petition for certiorari to set forth in the statement of the case the way in which the federal claims were passed upon by all state courts, and indicates specifically that reference should be made to the court opinion. Rule 14.1(i) also requires the appendix to the petition to contain the opinions and conclusions of law of the court whose judgment is sought to be reviewed. Absent an opinion, a party seeking to file a petition for certiorari with this Court is at a loss as to how the federal claims were passed upon by the court below and is unable to adequately present those claims.

These practical concerns are even more compelling where, as in the instant case, the state court's initial order indicates that an opinion explaining its reasoning will follow. A judgment or decree of the highest court of a state is "final," and so reviewable by this Court under 28 U.S.C. § 1257(a), where it is the "final word of a final court." *Market St. Ry. v. Railroad Commission of California*, 324 U.S. at 551. The purpose behind the requirement of finality is to prevent the waste of judicial resources and promote good judicial administration. *South Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (citing *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945)). It certainly does not promote judicial economy to require a party who knows that an explanatory opinion is forthcoming to submit a petition for certiorari that cannot properly address the disposition in the court below. Not only will the party have to revise the petition once the opinion is issued, but this Court would be required to review this revised petition and will have wasted its time in reviewing the first petition.

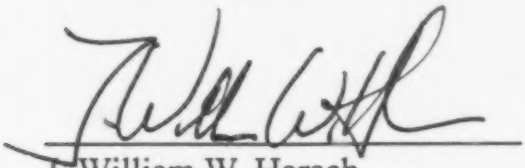
Therefore, an application of the 90-day time limit imposed by statute and Court rule that takes into account practical concerns requires that the instant petition not be deemed untimely. The situation here is not unlike cases in which this Court has held that the date a second judgment or decree is entered is deemed to be the date from which the time for petitioning for certiorari runs when the second judgment changes matters of substance "or resolves a genuine ambiguity." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 211. In the instant case, the Rhode Island Supreme Court's July 19, 1996 order was certainly ambiguous because it failed to set forth the reasoning for affirming the Superior Court,

which reasoning was certainly critical to this Court's decision on whether a writ of certiorari should be issued. In light of this ambiguity and the state court's statement that an opinion would follow, the time for petitioning for certiorari must be deemed to run from the date of the issuance of that opinion. It was only on the issuance of the opinion that it can be said that the "'issues were adjudged' and settled with finality" for the purpose of triggering the 90-day time period. *Scofield v. National Labor Relations Board*, 394 U.S. 423, 427 (1969) (quoting *Market St. Ry. v. Railroad Commission of California*, 324 U.S. at 551-52).

CONCLUSION

For the reasons set forth above, the Respondents' argument that this Court lacks jurisdiction to review the judgment of the Rhode Island Supreme Court should be rejected. The Petitioners therefore request that the petition for certiorari be granted.

Respectfully submitted,



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